Supreme Court, U.S.
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No. 96-1040

In The

Supreme Court of the United States

October Term, 1996

FRANCES D. BURNS,

Petitioner,

vs.

AAF-McQUAY, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the Fourth Circuit's decision that petitioner failed to proffer sufficient evidence that her voluntary resignation constituted a constructive discharge in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, based on petitioner's contention that the Fourth Circuit's decision conflicts with prior Fourth Circuit decisions and her assertion that the Fourth Circuit is without an effective test for evaluating constructive discharge claims.

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APPENDIX

Appendix A — Rule 40(b)(iii) of the Local Rules and Internal Operating Procedures of the Fourth Circuit 1a

Respondent AAF-McQuay, Inc. ("McQuay"), by counsel, requests the Court to deny the petition of Frances D. Burns for a writ of certiorari to review the September 23, 1996 judgment of the United States Court of Appeals for the Fourth Circuit remanding this matter for trial on the issue of whether petitioner was demoted in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"), but dismissing petitioner's claim that her voluntary resignation constitutes a constructive discharge.

STATEMENT OF THE CASE AND CORRECTION OF MISSTATEMENTS IN THE PETITION

On March 4, 1994, petitioner Frances D. Burns resigned her position as an employee of McQuay in its Staunton, Virginia facility. At the time of her resignation, petitioner was a receptionist/data entry operator. She had been transferred to that position in February, 1994. Prior to her transfer, petitioner had worked as secretary to McQuay's Human Resources Manager for approximately sixteen years; most recently for Stephen B. Horney, the current Manager of Human Resources at McQuay's Staunton facility.

Horney became the Manager of Human Resources at McQuay's Staunton, Virginia facility in November, 1992, and was petitioner's direct supervisor at all times relevant to this matter. At the time of petitioner's transfer to the switchboard, Horney was forty-six years of age and, therefore, a member of petitioner's protected group.

Soon after he arrived in Staunton, Horney discovered several problems with petitioner's performance as secretary to the Human Resources Manager. Horney testified that petitioner failed to perform organizational tasks (*e.g.*, she failed to make arrangements for an arbitration hearing in August, 1993), her

performance was inconsistent and, on several occasions, untimely, and she committed many errors. For example, petitioner was responsible for maintaining the Human Resource Department's files. On "numerous" occasions, however, Horney could not locate files, found materials misfiled, and discovered that file drawers and cabinets were mismarked.

Beginning soon after Horney arrived, petitioner committed typographical errors, and made mistakes in workers' compensation forms, union grievance forms, communications to the plant and general correspondence. Horney also testified that petitioner failed to prepare job postings in a timely manner (which was contrary to the terms of the collective bargaining agreement in force at the plant); failed to prepare employee status changes in a timely manner; and, refused Horney's specific instructions to reproduce certain departmental forms, to prepare employee identification badges on a daily basis, and to maintain the supply closet in an orderly manner.

Petitioner contends that, apart from her failure to make arrangements for the arbitration hearing in August, 1993 and a single typographical error, Horney never "expressed dissatisfaction with her performance." (*See* Petition for Writ of Certiorari ("Petition") at 4). Petitioner's assertion is belied by the record.

For example, petitioner misstates the record when she asserts that a December, 1993 is the "first and only specific instance of a typographical error that Horney can recall." (Petition at 4). Horney testified unequivocally that petitioner committed many errors and that, contrary to petitioner's attempt to mischaracterize his testimony, the August, 1993 incident in which petitioner failed to make arrangements for a union grievance hearing "was probably one of the last ones that more or less triggered [his] need to take actions." He testified that the

August, 1993 incident "might have been pretty close to the straw that broke the camel's back. . . ."[1]

In addition, although she asserts in her petition that Horney never "expressed any dissatisfaction with her performance" (Petition at 4), petitioner concedes that Horney told her in November, 1993 that her performance was "provisional" and she understood at that time that "provisional" was defined as "[b]elow average achievement which meets the minimum expectations of the position." Petitioner also concedes that Horney held meetings with her to discuss her performance deficiencies and acknowledged that the "conversations" she had with Horney regarding her performance "were negative."

Rather than terminate petitioner who was a long term employee, Horney transferred her to the switchboard where her weaknesses in typing, filing and organizational skills were less serious and her performance deficiencies would have less impact on the Human Resources Department. At the switchboard, petitioner's contact with Horney was lessened significantly. Petitioner's transfer did not reduce her pay, benefits or labor grade.

Petitioner's function as Human Resources secretary was filled by Donna Brown, a receptionist/data entry operator who had been employed by McQuay in various capacities since 1986. Brown was thirty-nine years of age at the time she swapped jobs with petitioner.

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1. Petitioner believes it is significant that "more than half of the alleged problems" with her performance purportedly were discovered after she was transferred to the switchboard or resigned. (Petition at 4, n. 4). Petitioner ignores the fact, however, that Horney's pre-transfer judgment regarding her performance was merely confirmed by the problems identified after petitioner was transferred to the receptionist position.

Throughout these proceedings, petitioner also has asserted that "employees at the Staunton facility expressed a not-so-subtle desire to remove Burns from her position as Human Resources secretary." (Petition at 5). In an attempt to support this claim, petitioner relies on the testimony of Gary Alderson and John Laub; both of whom were former supervisory employees at McQuay. Petitioner's position, however, is based on her own assumptions and speculation, and an incomplete description of the relevant, undisputed facts. (*See* Appendix to Petition for Writ of Certiorari ("Pet. App.") at 23-32).

Petitioner states, for example, that a former supervisory employee (Ira Luplow) opined to Gary Alderson, petitioner's former supervisor and Horney's predecessor, that "'he would like to get [petitioner] out of that position and get someone else in there younger." (Petition at 5). Petitioner, however, fails to inform the Court: (1) that Luplow did not occupy a position of authority over either Alderson or Horney; (2) that Alderson left the company before Horney was transferred to Staunton; (3) that Luplow made the alleged comment to Alderson ten months before Horney succeeded Alderson as Manager of Human Resources, twelve months before Horney began working full-time in Staunton, twenty-five months before petitioner was transferred to the switchboard, and twenty-six months before she quit her job; (4) that Luplow left his position at McQuay's Staunton facility five months before petitioner was transferred to the switchboard and six months before petitioner quit; and, (5) that it is undisputed that Luplow never made a comment to Horney regarding petitioner's age and that Luplow never repeated to Horney the statement he allegedly made to Alderson. There is, therefore, no nexus between Luplow's alleged statement and any of the employment decisions made by Horney.[2]

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2. Petitioner argued to the district court that a question exists regarding whether Horney may have been influenced by Luplow's alleged age-based

(Cont'd)

Petitioner also asserts that John Laub, a former managerial employee at McQuay, overheard a similar remark. (Petition at 5). After much confusion and contradictory testimony, Laub finally attributed the alleged remark to a former supervisory employee by the name of Paul Farris. (Pet. App. at 13). According to Laub, however, *if* Farris made the comment, he did so *after* both he and Laub had left the company; which was before Horney moved to Staunton and became petitioner's supervisor. (Pet. App. at 13 & n.3). The alleged remark, therefore, has no nexus to any adverse employment action allegedly suffered by petitioner. (Pet. App. at 13 & 23-28).[3]

(Cont'd)
animus against Burns and argued that a jury could find that Luplow talked to Horney about petitioner because they presumably talked to him about other matters. (Pet. App. at 27, n.10). According to the district court, however, it "is not possessed of the analytical dexterity to make an inferential leap of such magnitude," and petitioner's suggested "inference upon inference" is directly contradicted by Horney's undisputed testimony that Luplow never made any such statement to him. (Pet. App. at 27, n.10). Petitioner's "proffered evidence is strained, forced and contrary to both reason and the evidence presented in . . . this action." (Pet. App. at 25, n.9).

3. Petitioner also alleges that Horney and a co-worker made statements that revealed their "concern with her age. . . ." (Petition at 4-6). These alleged statements, however, are not evidence of age-based animus. The statements at issue are temporally remote, age-neutral or, in one instance, show a preference for older, more mature workers. Petitioner's view that the statements are based on McQuay's age-based animus towards her is pure conjecture and speculation. (Pet. App. at 30-32 & 50-52).

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S ALLEGATION THAT THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH PRIOR DECISIONS OF OTHER PANELS OF THE FOURTH CIRCUIT IS NOT A PROPER REASON FOR THE COURT TO GRANT A WRIT OF CERTIORARI.

Unless confronted with a "compelling reason," this Court wisely refuses to review judgments rendered by the courts of appeals. *See* Rule 10 of the Rules of the Supreme Court of the United States. Here, petitioner does not assert that any of the considerations apply which typically govern review on certiorari. Instead, petitioner alleges that the Fourth Circuit rendered a decision which conflicts with prior decisions of other panels of the Fourth Circuit.

A petition for writ of certiorari, however, is not the proper avenue of relief if petitioner believes the panel rendered a decision which is inconsistent with prior circuit precedent. Rather, a petition for rehearing to the court of appeals was the appropriate remedy if petitioner believed that the Fourth Circuit's decision was contrary to Fourth Circuit precedent. *See* Fed. R. App. P. 40. *See also* Local Rule 40(b)(iii) (reproduced at Appendix, *infra,* 1a). Here, despite the opportunity to do so, petitioner made no effort to avail herself of this potential avenue of review or relief. Her petition, therefore, should be denied.

II.

THE FOURTH CIRCUIT PROPERLY CONCLUDED THAT PETITIONER FAILED TO PRESENT SUFFICIENT EVIDENCE OF CONSTRUCTIVE DISCHARGE.

Moreover, contrary to petitioner's contention, the Fourth Circuit, consistent with its prior precedent, properly concluded that petitioner failed to proffer sufficient evidence of constructive discharge to prevent summary judgment. Her petition, therefore, should be denied.

As a threshold matter, petitioner asserts that the Fourth Circuit's dismissal of her constructive discharge claim is illogical because it remanded this matter for trial on the question of whether McQuay demoted petitioner in violation of the ADEA but affirmed the district court's finding that petitioner failed to prove constructive discharge. According to petitioner,

> [i]t is a logical conclusion that an employer who was motivated by illegal reasons in demoting an employee may have continued to be motivated by those same illegal reasons and acted upon them to force the employee out.

(Petition at 12). Petitioner's view, however, is pure speculation and ignores the well-settled principle that alleged unlawful discrimination alone cannot sustain a claim of constructive discharge. *See Jett v. Dallas Independent School Dist.*, 798 F.2d 748, 755 (5th Cir. 1986). If the rule were otherwise, any employee who resigned in the face of an adverse employment action (*e.g.*, demotion, failure to promote, etc.) would, in all instances, also state a claim for constructive discharge.

Instead, to establish constructive discharge, petitioner was required to produce evidence sufficient to show that McQuay intended her to quit and created intolerable working conditions to effectuate that intent. *See Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985). Petitioner was required to produce evidence sufficient to show that "a 'reasonable person' in the employee's position would have felt compelled to resign," *id.*; and that her working conditions were "intolerable in a discriminatory way." *Chambers v. American Trans Air, Inc.*, 17 F.3d 998, 1005 (7th Cir. 1994). Here, the Fourth Circuit correctly concluded that petitioner failed to present sufficient evidence that McQuay intended to force her from her job. (Pet. App. at 54).[4]

Petitioner apparently claims, for example, that McQuay's intent to force her to quit can be inferred because it failed to " 'act in the face of known intolerable conditions'. . . ." (Petition at 10, quoting, *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343 (4th Cir. 1995)). Petitioner's transfer to the switchboard, however, does not support petitioner' suggested "inference".

Petitioner acknowledged, for example, that her job as secretary to the Human Resources Manager included relieving on the switchboard while the receptionist/data entry operator was on vacation or on break. Petitioner also never told her supervisor or anyone else in McQuay's management that working at the switchboard was demeaning or demoralizing. In addition, petitioner's pay, benefits and labor grade remained the same when she was transferred to the switchboard.

Furthermore, Horney told petitioner and Donna Brown, petitioner's replacement, that he would discharge Brown if she

4. She also failed to proffer sufficient evidence that her working conditions were so intolerable that a reasonable person would have felt compelled to resign. (Pet. App. at 17-20).

did not perform well as his secretary. Horney told Brown that she would be terminated if she did not perform well because petitioner had been transferred to Brown's former position. That petitioner's failure in the secretarial position resulted in a transfer, while Brown, who was thirty-nine years of age, was threatened with termination, demolishes petitioner's argument that Horney's attitude toward her was age motivated.[5]

Petitioner also contends that her voluntary resignation amounts to a constructive discharge because Horney "harassed" her while she was working at the switchboard. (Petition at 7 & 14). Petitioner asserts that Horney "chastised" her for reading the newspaper at the switchboard (Petition at 7); yet she acknowledged in her deposition testimony that reading the newspaper at the switchboard is not permitted. Petitioner also asserts that Horney "admonished" her for failing to open the switchboard by 7:00 a.m. (Petition at 7); yet she acknowledged in her deposition testimony that when Horney entered the plant that particular morning the switchboard was open and she was not at her post.[6]

Moreover, reasonable employees usually explore "alternative avenues thoroughly before coming to the conclusion that resignation is the only option." *Clowes v. Allegheny Valley Hosp.*, 991 F.2d 1159, 1161-62 (3rd Cir. 1993), citing, *Boze v. Branstetter*, 912 F.2d 801, 805 (5th Cir. 1990); *Garner v. Wal-*

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5. As noted above, petitioner "swapped" jobs with Donna Brown, the incumbent receptionist/data entry operator, who had been employed by McQuay in various positions for approximately eight years. Horney also was responsible for supervising the receptionist/data entry position.

6. Petitioner also contends that Horney "berated" her upon her return from lunch in front of two salesmen. (Petition at 7). As the district court noted, however, petitioner never stated why Horney allegedly "berated" her. (Pet. App. at 19-20).

Mart Stores, Inc., 807 F.2d 1536, 1539 (11th Cir. 1987). If necessary, the reasonable employee would have "filed an age discrimination claim with the EEOC while employed," *McKethan v. Texas Farm Bureau*, 996 F.2d 734, 741 (5th Cir. 1993); "[i]t is far better for all concerned to resolve the dispute while the employment relationship is ongoing." *Johnson v. Shalala*, 991 F.2d 126, 131 (4th Cir. 1993).

Here, however, prior to being transferred to the receptionist position, petitioner never asked Horney to change his alleged "arrogant attitude" toward her, and never reported to anyone at McQuay that she thought Horney was being unfair to her.

Petitioner also never attempted to report Horney's alleged "arrogant attitude" or harassment to Horney's supervisor. Petitioner asserts now that she "was unable to resolve the problem internally because the company had made Horney its EEO compliance officer. . . ." (Petition at 8). This assertion, however, does not account for her failure to report Horney's alleged conduct to anyone in McQuay's chain of command.

In addition, for the two months before she resigned petitioner was represented by counsel. She could and should have pursued her EEOC remedies before quitting and claiming constructive discharge. *See Brooms v. Regal Tube Co.*, 881 F.2d 412, 423 (7th Cir. 1989); *Bourque v. Powell Elec. Mfg. Co.*, 617 F.2d 61, 65-66 (5th Cir. 1980). In that way, the employment relationship may have been salvaged. Petitioner, however, resigned without giving "these remedies the opportunity to work." *Paroline v. Unisys Corp.*, 879 F.2d 100, 114 (4th Cir. 1989) (Wilkinson, J., dissenting), *vacated in part on rehearing en banc*, 900 F.2d 27 (4th Cir. 1990) (*en banc*) (adopting panel dissenting opinion). *Accord Shalala*, 991 F.2d at 131.[7]

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7. McQuay also submits that petitioner failed to proffer evidence sufficient to show that Horney treated her differently than he treated other

(Cont'd)

Based on the foregoing, the Fourth Circuit correctly concluded that petitioner failed to present evidence sufficient to lead a reasonable trier of fact to conclude that she was constructively discharged from her employment. (Pet. App. at 53-55). Therefore, as the Fourth Circuit concluded, petitioner cannot convert her decision to quit her job into a claim for constructive discharge under the ADEA.

III.

THIS COURT SHOULD REJECT PETITIONER'S INVITATION TO IMPOSE ON ALL FEDERAL COURTS THE FIFTH CIRCUIT'S MULTI-FACTOR TEST FOR EVALUATING CLAIMS OF CONSTRUCTIVE DISCHARGE.

Petitioner contends that the Fourth Circuit erred because it lacks "an objective framework for analyzing circumstantial evidence of constructive discharge" (Petition at 12) and that the

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employees. Petitioner asserts that one of her co-workers testified that Horney was "more critical" of petitioner than he was of other employees. (Petition at 6). Plaintiff, however, misstate the record. The co-worker merely speculated that it was "possible" that Horney was more critical of petitioner and that Horney "[m]ight have been" more critical of petitioner.

Moreover, according to petitioner's "rough" estimate, Horney displayed the same alleged arrogant attitude toward approximately ten or twelve other McQuay employees; some who are members of petitioner's protected class, others who are not. This evidence was undisputed, and rebuts any inference that Horney intended for her to resign; certainly he "did not wish to force all of [his] employees to resign." *Paroline*, 879 F.2d at 114, quoting, *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981). *See also Bristow*, 770 F.2d at 1255 (where employees are treated the same, "no particular employee can claim that difficult working conditions signify the employer's intent to force that individual to resign").

Court, therefore, should impose on the Fourth Circuit and its sister circuits the multi-factor test articulated by the Fifth Circuit for evaluating claims of constructive discharge. (Petition at 14-17, citing, *Barrow v. New Orleans Steamship Ass'n*, 10 F.3d 292 (5th Cir. 1994)). Petitioner opines that the Fifth Circuit's analysis in *Barrow* would "bring clarity and uniformity to constructive discharge law to all the circuits in employment discrimination actions." (Petition at 17). Petitioner's view is without merit.

Although petitioner asserts that her proffered multi-factor analysis will provide "uniformity" to the thirteen courts of appeals and the ninety-one judicial districts, in the three years since it was articulated, the *Barrow* test has not even brought "clarity and uniformity" to the courts of the Fifth Circuit. Compare *Blouin v. Kaiser Aluminum & Chem. Corp.* 1996 WL 19138 (E.D. La. 1996), *aff'd,* 103 F.3d 127 (5th Cir. 1996) (summary judgment for employer granted as to plaintiff's constructive discharge claim despite the fact that plaintiff was assigned to less lucrative shifts and subjected to multiple "incidents of harassment"); *Ellzey v. Espy,* 1995 WL 6277 (E.D. La. 1995) (summary judgment for employer denied as to plaintiff's constructive discharge claim because plaintiff reassigned to work under younger supervisor and to perform menial tasks); *Cargile v. Star Enterprise*, 872 F. Supp. 1514, 1517 (M.D. La. 1994) (summary judgment for employer granted as to plaintiff's constructive discharge claim despite the fact that plaintiff was deprived of all of his prior management responsibilities).

Perhaps this is why the *Barrow* court's multi-factor analysis has never been cited outside the Fifth Circuit. This may also explain why petitioner did not request the Fourth Circuit to adopt the Fifth Circuit's analysis in *Barrow*; an independent ground

for the denial of a writ of certiorari. *See Adickes v. S.H. Kress & Co.*, 90 S. Ct. 1598, 1602 n.2, 398 U.S. 144, 147 n.2 (1970).[8]

CONCLUSION

Based on the foregoing, the writ of certiorari should be denied.

Respectfully submitted,

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8. *EEOC v. Fed. Labor Relations Admin.*, 106 S. Ct. 1678, 476 U.S. 19 (1986) (absent exceptional circumstances, "[o]ur normal practice, from which we see no occasion to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals").

APPENDIX A — RULE 40(b)(iii) OF THE LOCAL RULES AND INTERNAL OPERATING PROCEDURES OF THE FOURTH CIRCUIT

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist:

i. A material factual or legal matter was overlooked in the decision.

ii. A change in the law occurred after the case was submitted and was overlooked by the panel.

iii. The opinion is in conflict with another decision of the Court or of another court of appeals and the conflict is not addressed in the opinion.